UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

THE KROGER CO. OF MICHIGAN,

Respondent,

and **Case No: 07-CA-098566**

ANITA GRANGER, an Individual,

Charging Party.

BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

Administrative Law Judge David Goldman's ("the ALJ") decision can only be read to outlaw virtually every social media policy in existence – including those which have previously received the Board's blessing. Vacillating between requiring purposeful vagueness and unlawfully burdensome specificity, the ALJ's decision ignores all comparable Board precedent, the Board's own General Counsel, and creates conflict between the Regions. The Board should reject the ALJ's decision and issue clear and concise guidelines, based on policies already accepted by the Board.

The Respondent, the Kroger Co. of Michigan ("Kroger" or "the Respondent"), excepts to the findings of the ALJ that certain provisions of Kroger's social media policy violate Section 8(a)(1) of the National Labor Relations Act ("the NLRA" or "the Act") because they had a chilling effect on the exercise of Section 7 rights. Respondent also excepts to the ALJ's determination that the portion of the Charge relating to the February 2011 policy was not time-barred, and his refusal to consider evidence that a similar policy was approved by Region 19 in a case involving one of Respondent's affiliates.

The General Counsel argued, and the ALJ agreed, that online communications are similar to the proverbial water cooler conversation. This is a fundamental misunderstanding of the way online communication works generally, and the way social media works specifically. Kroger's policies apply to content "published" online. The term publish means "to make generally known" or "to make public announcement of" or "to disseminate to the public." (Merriam Webster Online Dictionary, accessed 06/04/2014).[1] Publications and a conversation at the water cooler have nothing in common.

Online statements are not conversations between coworkers, where the individuals engaging in the conversation know each other, including their positions within the company. They are not conversations that are overheard by customers, where, again, context would make clear that the cashier or meat-cutter is not speaking on behalf of the company as a whole. The unlimited audience and lack of context make the water-cooler analogy misplaced. A better analogy is the editorial pages of the newspaper – an actual publication – which may be distributed far and wide, rather than a private or semi-private conversation.

Kroger's policies are consistent with the model policy provided in OM 12-59 (hereinafter the "Approved Policy"). Kroger's policies are also substantively identical to a social media policy approved by the NLRB Region 19 Director in a proceeding involving Kroger's affiliate, Smith's Food & Drug Centers ("Smith's") (Case No. 19-CA-32789).

The policies comport with the Board's approval of language that requires employees to make clear that postings are their own and are not made on behalf of their employers. They protect Kroger's intellectual property assets only to the extent otherwise provided by the law. They prohibit employees from posting internal business-related confidential communications,

[1] This is the same online dictionary consulted by the ALJ for definitions of "rumor" and "gossip." (ALJ, p. 15).

which employees have no protected right to disclose. And they create a level playing field between inappropriate postings and inappropriate behavior that occurs in the workplace. Thus, the Respondent's policies serve a number of completely legitimate business purposes with respect to communications which are broadcast far beyond other employees – to customers, suppliers, stockholders, and the general public.

The ALJ refused to consider evidence relating to the Smith's policy, which the Respondent proffered to show that the Board – in a case involving an affiliate of Kroger – approved the language of these policies. Region 19's endorsement of Smith's policy is relevant because just as employers should be able to rely on the Approved Policy, they should be able to rely on the Board's indication that particular language is lawful, especially where the companies are affiliated.[2]

Finally, allegations in the Complaint relating to the February 2011 Policy are untimely because that policy was not maintained within six months of the filing of the underlying Charge. See 29 U.S.C. § 160(b).

Accordingly, the Board should grant Respondent's Exceptions and amend the Decision and Order of the Administrative Law Judge.

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS

Respondent is a Michigan corporation that operates 134 stores throughout Michigan. (Hearing Ex. GC-1(o)). Anita Granger ("Granger" or "Charging Party") was employed at

[2] To the extent that the Region 19 materials suggest that the Region is not taking a position on the lawfulness of the policy, Kroger cries foul. Approving a settlement that includes the introduction of a new policy to avoid being prosecuted for the old policy must, by necessity, permit an inference of legality of the new policy. If any Region is approving settlements without considering the legality of the terms of those agreements (which include the negotiated remedies), they are engaging in a bureaucratic shell game that wastes public and private time and money.

Kroger's Flint, Michigan store. (*Id.)* In February 2011, Kroger promulgated an Online Communications Policy ("the February 2011 Policy"). (Hearing Ex. GC-5, p. 31). In June 2011, the February Policy was expressly rescinded and replaced with a revised policy ("the June 2011 Policy"). (Hearing Ex. R-3). On August 24, 2011, Kroger specifically notified all of its Store Managers, Associate Store Managers, Co-Managers, District Managers, and Human Resources Personnel that any Online Communications Policy dated prior to June 24, 2011 was rescinded, should be disregarded, and was replaced by the June 2011 Policy. (*Id.*) All employees were notified of the change via postings on the Communication Board and near the time clocks in every Kroger store. Notice of the revised policy was also given to employees by an online posting on Kroger's intranet. (Tr. 51-52).

Granger filed an unfair labor practice charge in February 2013, alleging that she was unlawfully terminated based on her social media activities. (Hearing Ex. GC-1(a)). The charge was amended on May 5, 2013, and alleged that Kroger (1) "has maintained and promulgated a social media policy that interferes with, restrains, and coerces employees in the exercise of their Section 7 rights," and (2) "On or about December 16, 2013, [] terminated its employee, Anita Granger, for violation of its social media policy, in violation of Section 8(e)(1) of the Act." (Hearing Ex. GC-1(d)). These allegations were asserted in the Complaint filed on August 30, 2012 against Kroger. (Hearing Ex. GC-1(m)).

A hearing was held on January 27, 2014. The portion of the charge with respect to Charging Party's termination was settled and the Complaint was amended to remove allegations relating to Granger. (Hearing Ex. GC-2; Tr. 7-8). Thus, the only issue before the ALJ was the lawfulness of the policies. The ALJ issued his decision on April 22, 2014 ("the ALJ Decision").

III. BACKGROUND

A. Social Media Background

There can be no serious dispute that the use of social media has exploded in the last decade. According to the PewResearch Internet Project,[3] as of May 2013, "almost three quarters (72%) of online U.S. adults use social networking sites, up from 67% in late 2012." In 2005, only 8% of online adults said they used social media. This number is relatively consistent across gender, race, educational levels, and incomes. Younger people have a higher percentage of use (89% for 18-29 year olds), but even for adults over 65 the percentage of social media users has risen to 43%. For companies like Kroger, that means that the vast majority of its employees use social media. Likewise, it is safe to assume that most of Kroger's customers also use social media. Given the potential for online interaction between employees, and between employees and customers, employers have a duty to ensure that those interactions do not sully the goodwill of the Company, its customers, or its employees, while at the same time protecting confidential business information and ensuring that online activity does not create a hostile work environment.

B. General Legal Principles

1. Work Rules and Section 7 Rights.

An employer violates §8(a)(1) of the Act when it maintains a work rule that would "reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enf'd 203 F.3d 52 (D.C. Cir. 1999). The test for finding interference, restraint, or coercion under §8(a)(1) is an objective one, and does not turn on an employee's subjective interpretation of a statement or rule. *Miami Systems Corp*, 320 NLRB 71, fn. 4 (1995), enf'd in relevant part, 111 F.3d 1284, 1294 (6th Cir 1997).

[3] http://www.pewinternet.org/2013/08/05/72-of-online-adults-are-social-networking-site-users/, accessed 5/29/2014.

In determining whether a work rule violates §8(a)(1) of the Act, the Board must first determine whether the rule explicitly prohibits activity protected by Section 7. If the rule does not, the rule only violates the Act if (1) employees would reasonably construe the rule's language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been actually applied to restrict Section 7 rights. *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004) ("Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could be conceivably read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.").

Consistent with *Lutheran Heritage Village,* the Board in *Hyundai American Shipping Agency,* 357 NLRB No. 80 (2011), held in dismissing the charges:

> Here, neither the Respondent's "harmful gossip" rule nor its "negative attitude" rule explicitly restricts activity protected by Section 7. Moreover, there is no evidence that either rule was promulgated in response to union activity or was applied to restrict the exercise of Section 7 rights. Accordingly, the only question is whether the Respondent's employees would reasonably construe the two rules to prohibit Section 7 activity.

357 NLRB No. 8, slip op. at 2.

In *Lutheran Heritage,* the Board cautioned that in reviewing an employer's work rule to determine whether it would tend to chill Section 7 activity, "the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage,* 343 NLRB at 646; see also, *Lafayette Park Hotel,* 326 NLRB at 825 (1998); *Adtranz ABB Daimler-Benz Transp., N.A. Inc. v. NLRB,* 253 F.3d 19 (D.C. Cir. 2001); *Tradesman International,* 338 NLRB 460, 462

(2002). The Board has consistently indicated that it will not find a violation simply because a rule could be conceivably interpreted to prohibit Section 7 activity. *Lutheran Heritage*, 343 NLRB at 647; *Palms Hotel and Casino*, 344 NLRB 1363, 1368 (2005) (advising "We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral work rule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it").

Furthermore, the Board recognizes that "[w]ork rules are necessarily general in nature" *Lutheran Heritage*, 343 NLRB at 648, and employers are not required to "anticipate and catalogue in their work rules every instance in which... language might conceivably be protected by (or exempted from the protection of) Section 7." (*Id.*, at 648). Compliance with Section 8(a)(1) does not, therefore, require policies to set forth an "exhaustively comprehensive rule anticipating any and all circumstances in which the rule even theoretically could apply." *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998).

2. An Employer's Legitimate Business Interests

When construing an employer's rule to determine whether it would reasonably tend to chill Section 7 activity, the Board's review should not be limited to the four corners of the rule. Instead, the employer's proffered business reasons for promulgating a rule should be considered. *Lafayette Park Hotel*, 326 NLRB at 827. In deciding *Lafayette Park Hotel* the Board considered the fact that employees would not find a rule ambiguous because they would recognize the employer's proffered legitimate business reason for promulgating the rule. (*Id.*, see, also, *Tradesman International*, 338 NLRB at 461 (2002)).

In reviewing an employer's work rules, consideration is also given to an employer's actions, such as whether the rule has been forced against employees for engaging in Section 7

activities, whether the rule was promulgated in response to union or protected activity, or whether the employer had exhibited anti-union animus. *Tradesman International* at 641-642 (citing the *Lafayette Park Hotel* Board's reliance on the absence of these factors in determining that an allegedly overbroad rule did not violate Section 8(a)(1)). Additional support for this proposition can also be found in the Report of the Acting General Counsel Concerning Social Media Cases, OM 12-31 (Jan. 24, 2012), wherein the Acting General Counsel advised that an employer's application of its social media policy to restrict employees' protected Facebook discussions would ". . . reasonably lead employees to conclude that protected complaints about their working conditions were prohibited," but finding a revised policy lawful in part because "there was no evidence that the amended policy had been utilized to discipline Section 7 activity." See OM 12-31 at 16-17. Thus, absent inappropriate motive or enforcement, a rule that is facially neutral and protects a legitimate business interest of the employer should be held lawful.

IV. ARGUMENT

A. The Portion Of The Policy Requiring A Disclaimer If An Employee Identify Themselves As A Kroger Employee Is Not Overly Broad Or Burdensome And Cannot Reasonably Be Read To Restrict Section 7 Rights.

The Employer's June 24, 2011 Online Communications Policy provides, in pertinent part, as follows:

> The company recognizes that online communications (such as social networking sites, personal websites, podcasts, videos, or blogs) are increasingly becoming a part of everyday life and are important to many associates.
>
> Likewise, online sources can influence the public's impressions of the Company. When associates identify themselves as members of the Company and engage in inappropriate online communications, they can have a negative effect on the Company. Therefore, the Company has a policy on online communications.
>
> * * *

> If you identify yourself as an associate of the Company and publish any work-related information online, you must use this disclaimer: "The postings on this site are my own and do not necessarily represent the positions, strategies or opinions of The Kroger Co. family of stores."

(Respondent's Policy, quoted at ALJ, p. 4).[4]

1. The Disclaimer Required By The Policy Is Not Overly Broad Or Burdensome And Cannot Reasonably Be Read to Chill Section 7 Rights.

The ALJ ruled that the disclaimer provision violates Section 8(a)(1) of the Act. (ALJ, p. 12). The ALJ conceded that the rule at issue here "does not flatly prohibit any Section 7 communications, or, indeed, any communications at all." (ALJ, p. 9). The ALJ also conceded that there is no evidence or allegation that the rule was promulgated in response to union activity or was applied to restrict the exercise of Section 7 rights. (ALJ, p. 8). It is thus undisputed that, as in *Lafayette Hotel*, *Lutheran Heritage* and *Hyundai American*, the only question is whether employees "would reasonably construe the rule to prohibit Section 7 activity." In finding that they would, the ALJ ignored the well-established standards set forth above and applied his own standard of whether the disclaimer would unduly burden "legitimate Section 7 communication to an extent that would be likely to chill employees [sic] willingness to engage in it" as balanced against "any legitimate interest the employer has in the burdening of those rights." (ALJ pp. 9-10).

The disclaimer requirement only applies if (1) the employee identifies him or herself as a Kroger employee, and (2) publishes any work-related information online.[5] If both conditions

[4] The portions of the February 2011 and June 2011 Policies relevant in this section are identical.

[5]Thus, if someone identifies himself as a Kroger employee and notifies other employees of organizational meetings the disclaimer does not apply. If someone discusses work-related matters without identifying him/herself as a Kroger employee the disclaimer requirement does not apply.

exist, then the disclaimer rule would require the employee to type one sentence clarifying that the postings are not necessarily those of Respondent. Once the brief disclaimer is entered, the employee has no further obligation and the employee is free to communicate virtually any thoughts to other employees or to the public. The ALJ concluded that this modest requirement imposes a burden on employees such that it "would be likely to chill employees willingness to engage" in protected rights. To the contrary, a disclaimer has the opposite impact because it indicates to employees that they are free to speak as long as they are not representing themselves as Kroger employees, or if they include the disclaimer.

It is true that, where applicable, the employee would be "burdened" by taking 30 seconds of his personal time to type the disclaimer. The exercise of Section 7 rights are in many cases "burdened" by requiring the employee to utilize personal time much greater than typing a one-sentence disclaimer. In those cases the burden was not thought to chill the exercise of Section 7 rights.

In setting forth his preliminary conclusions, the ALJ noted:

> Third, the breadth of the rule is such that we are considering a rule that covers employees who are posting online using their own computers and networks, while off-work, and at a home. In other words, this is not a *Register-Guard* case.[2]
>
> [2] See *Register-Guard*, 351 NLRB 1110 (2007) (holding that employees have no statutory right to use employer's email system for Section 7 purposes when ban on such use nondiscriminatorily maintained and applied), enfd. in part, denied in part, 571 F.3d 53 (D.C. Cir. 2009).

(ALJ, p. 9). The ALJ overlooked the fact that the employee in *Register-Guard* is "burdened" by the requirement that the composition and entry of the entire posting must be done on the employee's own time and own computer. This burden is greater than the alleged burden of typing the disclaimer required by Respondent's rule, yet the employer rule in *Register-Guard*

was found to be lawful. There are many other examples where employees are burdened in the exercise of Section 7 rights.[6]

The ALJ then engaged in unbridled speculation on how the rule might be interpreted by employees. Although the disclaimer is only required under specific circumstances, the ALJ held:

> Each time an employee spoke about workplace conditions in any capacity that would reveal or suggest themselves to be an employee of Kroger—and speaking firsthand about workplace conditions by itself suggests affiliation with the employer—the disclaimer would have to be repeated.

Speaking about work-related issues doesn't "suggest" anything and even if it did, it would be a far cry from "identifying yourself as a Kroger employee." While the reader may conclude that the author who works in a meat department works for a grocery store, there would be no basis to conclude the author works for Kroger.

The ALJ also then surmised that the rule could be understood to apply if someone "liked" the communication, in which case the employee would be required to enter the disclaimer. (ALJ, p. 10). This is clearly not true. The rule applies only to those who identify themselves as a Kroger employee and publish any work-related information. Clicking on Facebook's "Like" button is not a publication in any sense, nor does it carry any work-related information.

The ALJ claimed that the rule "poses more subtle risks of chilling effects" because it is "an implicit reminder of the involvement and insertion of the employer" in work-related discussions. (ALJ, p. 10). But there is no suggestion that the employer inserted itself into any discussion. The employer does not seek to intrude – quite the opposite. The purpose of the disclaimer is to extricate and disassociate the employer from whatever comments are made. The

[6] For example, using only personal time (breaks or lunch period) to discuss union matters, driving to a union hall for a meeting, hand billing or picketing – the list goes on.

ALJ cited the "implicit but unavoidable specter of enforcement," (ALJ, p. 10), which of course exists with any work rule. The ALJ then presented speculation followed by a hypothetical:

> Not all online communications are public, but they are all subject to monitoring with and sometimes without the knowledge of the individuals engaged in discussion. This prospect, which is implicit in a rule such as this, cannot but have a tendency to chill Section 7 speech, just as would an employer that threatened to check union meetings and gatherings to see if disclaimer rules are being complied with in that setting.

(ALJ, p. 10). The rule here only applies to published online communications – not private online communications. The ALJ's speculations are outside the scope of the evidence and contrary to the Board's well-established guidelines for examining facially neutral policies. All of this speculation by the ALJ goes too far. *Lutheran Heritage* Village makes clear that the ALJ is not invited to conjure up every conceivable interpretation of the rule, even where that interpretation is unreasonable. *Lutheran Heritage Village*, 343 NLRB at 647; see, also, *Copper River of Boiling Springs*, 360 NLRB No. 60 (2014). The ALJ's reading assumes too much. A reasonable interpretation of the rule is that an employee who says "I work for Kroger" online must also say "I don't speak for Kroger" when discussing work. No more. The ALJ goes too far, and should be overruled.

2. The ALJ Did Not Consider All Of The Employer's Legitimate Business Interests.

The ALJ narrowly interpreted the Kroger policy as involving only an employer interest in not having employees appearing to speak on behalf of Kroger. The ALJ noted "[i]t may be assumed that employees do not have a legitimate Section 7 right to speak without authorization *on behalf* of their employer." (ALJ, p. 10). While that is a legitimate interest of the employer; it is not the only one.

The employer also has an important legitimate interest in avoiding damage to its good name and reputation in the community, and the potential impact on sales when self-identified Kroger employees engage in comments that are offensive to a segment of the public. The work rule explains why Kroger needs a disclaimer to disassociate itself from such remarks:[7]

> The company recognizes that online communications (such as social networking sites, personal websites, podcasts, videos, or blogs) are increasingly becoming a part of everyday life and are important to many associates.
>
> *Likewise, online sources can influence the public's impressions of the Company. When associates identify themselves as members of the Company and engage in inappropriate online communications, they can have a negative effect on the Company. Therefore, the Company has a policy on online communications.*

(The policy is cited at ALJ, p. 4).

In the retail world, sales are the lifeblood of the employer, and hence establishing and maintaining good relations with the public are imperative. The Board has ruled that an employer has a legitimate interest in maintaining its "reputation or good will in the community."[8] Clearly, self-identified Kroger employees who make offensive, hurtful statements about a segment of the public harm the company's reputation and relationship with customers or potential customers. (Did you hear what Kroger employees are saying about us?)[9] The employer has a legitimate business interest in disassociating itself from such comments.

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[7] And, as noted throughout this Brief, the policy must be read, understood and interpreted as a whole.

[8] *Lafayette Park Hotel*, 326 NLRB 824, 826-827, in which the Board ruled that the following rule was lawful:

> Unlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community. (emphasis added).

[9] There are many comments on work-related issues that could negatively impact the company, e.g., complaints about waiting on a certain group of customers or working with a certain group of employees.

Finally, as a publicly-traded company, Kroger has a legitimate business interest – and a legal obligation – to ensure that information is disclosed through appropriate channels. For example, the Securities and Exchange Commission has extensive regulations relating to the disclosure of information. See, *e.g.*, SEC Regulations FD, G and M.A. Requiring employees to indicate that they are not speaking with authorization from the Respondent ensures that Kroger is not running afoul of these rules.

The Approved Policy in OM 12-59 provided, in part:

> Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of [Employer]."

The Approved Policy is broader than Kroger's because it requires a disclaimer for any "subjects associated with" the company, thereby applying the Approved Policy to a much broader universe of situations. Kroger's policy is tailored to protect its legitimate business interests. The Board should set aside the ALJ decision and rule that the "disclaimer" provision is lawful.

B. The Portion Of The Policy Relating To Kroger's Intellectual Property Is Not Overly Broad And Cannot Reasonably Be Read To Restrict Section 7 Rights.

The Employer's Online Communication Policy provides, in pertinent part:[10]

> You must comply with copyright, fair use and financial disclosure laws, and you must not use without permission or compromise in any way the Company's intellectual property assets (like copyrights, trademarks, patents or trade secrets - including, for example, Kroger or banner logos, or trade names of products, or non-public information about the Company's business processes, customers or vendors).

(ALJ, p. 5).

[10] Again, the relevant portions of the February 2011 and June 2011 policies are identical.

Intellectual property assets are, of course, of great value and an employer has the general right to protect those assets.[11] The ALJ made no finding and issued no remedial order with respect to the first portion of the rule. (ALJ, p. 24). The ALJ held that the rule prohibiting the use of the employer's intellectual property assets without permission of the employer was overbroad because "[t]he focus is not on compliance with the law, but with not using Kroger's logos, banners, etc., under any unapproved circumstances, many of which, would not violate intellectual property law." (ALJ, p. 13).

The ALJ commenced his analysis with an examination of the contours of copyright and trademark law. With respect to copyrighted material, the ALJ cited a copyright infringement case, *Campbell v Acuff-Rose Music, Inc.*, 510 US 569, 576-577 (1994), for the proposition that "fair use laws permit the limited use of copyrighted material for parody, comment and other noncommercial uses." (ALJ, p. 13).[12] With respect to trademark law, the ALJ posited that "the 'central inquiry' is the risk of confusion by the public regarding the source or identity of the user—where there is no reasonable risk, trademark law is not violated. *Water Pik, Inc. v. Med-Systems, Inc.*, 726 F.3d 1136, 1142-1143 (10th Cir. 2013); *Smith v. Chanel, Inc.*, 402 F.2d 562, 563 (9th Cir. 1968)."[13]

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[11] Intellectual property rights are negative rights that allow their holders to keep others from engaging in activities that fall within their boundaries and, as such, represent a restraint on otherwise lawful activity. In the absence of a defense, such as prior use or fair use, others must avoid activities that fall within the scope of the right or must secure permission, usually accompanied by a fee, to use the protected works. See, e.g., *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 122 S. Ct. 1831, 1836-37 (2002); *Qualitex Co. v. Jacobson Prods. Co.*, 115 S. Ct. 1300, 1303 (1995).

[12] A rap group's parody of "Pretty Woman" was held to be transformative, not the original work. 510 US 579-583.

[13] In *Water Pik, Inc.*, the maker of SinuSense sought a declaratory judgment that there was no trademark infringement on SinuCleanse. In *Smith v. Chanel, Inc.*, the issue was whether one

From this, the ALJ concluded that there are many lawful ("nonoffensive") "uses of an employer's 'intellectual property' that employees might utilize for purposes protected by Section 7." (ALJ, p. 13). The ALJ posed the issue as whether certain conduct may be lawful under the copyright and trademark laws. But the question is not whether the conduct is lawful[14] under unrelated statutes, but, rather, whether the work rule reasonably tends to chill employees in the exercise of Section 7 rights. As explained by the ALJ in *General Motors, LLC,* Case 07-CA-53570 (2012):

> Section 32 of the Lanham Act imposes liability for trademark infringement on any person who, without the consent of the owner of the trademark, uses it for any number of enumerated commercial purposes. On the other hand, if the use of the trademark is for expressive purposes, i.e., to communicate an idea, such as commentary, comedy, parody, news reporting or criticism, it is considered noncommercial and falls within the protections of the First amendment. See Gilston, Trademark Protection and Practice (Bender 2005), Section 11.08[4][1][i]; and *CPC International v. Skippy, Inc.,* 214 F.3d 456, 461-463 (4th Cir. 2000). Here, though, the issue before me is not the constitutionality of the restriction but whether it would reasonably lead employees to believe that it interferes with their Section 7 rights. (emphasis added) (footnote omitted)

(slip op. at 6).

The ALJ in this case relied on two cases, *Spirit Construction Services,* 351 NLRB 1042, 1045 (2007) and *Pepsi-Cola Bottling Co.,* 301 NLRB 1008, 1019-1020 (1991), for the

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who copied an unpatented product sold under a trademark may use the competitor's trademark in advertising to identify the product copied.

[14] Many, if not most, work rules involved deal with conduct which is "lawful" if engaged in by a member of the public. For example, it is "lawful" to be rude or discourteous to shoppers, but that does not deny an employer the right to prohibit such conduct in a work rule. It is also "lawful" for a member of the public to disparage a company, but that does not deny an employer the right to prohibit disparagement in a work rule. See, for example, *Tradesmen International, Inc.,* 338 NLRB 460, 172 LRRM 1074 (2002) (a conflict of interest rule prohibiting employees from engaging in conduct that is "disloyal, deceptive, competitive or damaging to the Company" is lawful). *Five Star Transport, Inc.,* 349 NLRB 42, 181 LRRM 1137 (2007) (lawful to refuse to hire a person who had disparaged the employer). *Endicott Interconnect Technologies, Inc. v. NLRB,* 453 F2d 532, 179 LRRM 3276 (D.C. Cir. 2006) denying enforcement to 345 NLRB No. 28, 178 LRRM 1169 (2005) (employee lost protection under the Act by making disloyal, disparaging and injurious statements about the employer's recent layoffs).

proposition that employees have the right to use company logos. The ALJ's reliance on these cases is misplaced. *Spirit Construction Services* did not involve, as the ALJ suggested, the wearing of employer logos. Rather, the case involved the employer's requirement that an employee remove a **union** sticker from his hardhat in the midst of an organizational drive. In *Pepsi-Cola Bottling Co.*, the employer adopted a new work rule in the midst of a union organizational drive which prohibited "conducting of union activities in public places by any employee while wearing a uniform." 301 NLRB at 1019. The rule was read as prohibiting wearing a uniform while engaging in union activity during non-working time, outside the plant.

More on point is *General Motors, LLC*, Case 07-CA-53570, which involved a social media work rule. GM's rule stated that employees should not "incorporate GM logos, trademarks, or other assets in [their] posts." (slip op. at 6). In *General Motors*, the ALJ rejected *Pepsi-Cola Bottling* as applicable precedent and held the rule to be lawful.

> . . . General Counsel neglects to cite *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999), a later case that distinguished *Pepsi-Cola* and reached an opposite result on point. In *Flamingo Hilton-Laughlin*, the Board upheld an administrative law judge's dismissal of an allegation that a company rule against wearing hotel uniforms off company premises constituted an excessive impediment to union activity. The judge distinguished *Pepsi-Cola* on the basis that the rule therein was promulgated in response to a union organizing drive and specifically stated that employees could not engage in union activities while wearing company uniforms, factors not present in the case before him. Id. at 292-293.
>
> Here, GM is a unionized company, the logo rule on its face applies to all employees, no evidence suggests it was motivated by antiunion considerations, and the Respondent has offered a bona fide reason for its promulgation. In these circumstances, I find the reasoning of the judge in *Flamingo Hilton-Laughlin* persuasive and conclude that the rule restricting use of GM's logo does not violate Section 8(a)(1).

(slip op. at 7). As in *General Motors*, Kroger's policy was not adopted in the midst of an organizational drive. And, in *General Motors*, Kroger "is a unionized company, the logo rule on

its face applies to all employees, no evidence suggests it was motivated by antiunion considerations, and the employer has offered a bona fide reason for its promulgation."

The ALJ concluded his analysis by ruling that the policy was unlawful because the employer reserved the right to license/authorize use of its intellectual property assets. The ALJ opined that use of the intellectual property assets required the company's permission and management would have discretion over when permission was granted:

> The Respondent's flat prohibition on employee use of any of its "intellectual property" without permission of the Respondent, will limit, without grounds, many activities that are protected by Section 7. The requirement that employees request and receive permission in order to find out if Section 7 activity will be permitted is antithetical to the Act. See, *J.W. Marriot*, 359 NLRB No. 8 (2012) (managers' absolute discretion over application of rule is unlawful because it requires management permission to engage in Section 7 activity and leads employees to reasonably conclude that they are required to disclose to management the nature of the activity for which they seek permission, a compelled disclosure that would certainly tend to chill the exercise of Section 7 rights). Accordingly, it is an overbroad restriction.

(ALJ, p. 13).

J.W. Marriot, 359 NLRB No. 8 (2012), cited by the ALJ, involved work rules which restricted employees' access and use of company facilities for Section 7 activities. The majority of the Board panel held that the rules failed under the general test applied to workplace rules under *Lutheran Heritage Village,* 343 NLRB at 646-647 (2004) because it gave "managers absolute discretion to grant or deny access for any reason, including to discriminate against or discourage Section 7 activity." The judge therefore found that the rule "invites reasonable employees to believe that Section 7 activity is prohibited without prior management permission."

The "permission" case cited by the ALJ here (*J.W. Marriot*), and the cases cited therein, turn on the fact that employees possessed the underlying Section 7 right to engage in protected concerted activity in the workplace. The cases dealt with the employees' ability, without

employer permission, to communicate with fellow employees (i.e., solicitation) during nonwork time and in nonwork areas. *Brunswick Corp*., 282 NLRB 794 (1987). Absent the circumstances in *Spirit Construction* or *Pepsi-Cola Bottling* (which do not exist here), there is no Section 7 right to appropriate company owned intellectual properties and thus these cases are inopposite.

The core principle involved in prior cases "make central to Sec. 7 the ability of employees to communicate with their fellow employees in the workplace." This includes not only the right to solicit during nonwork time and in nonwork areas, but also access to workplace communication sites. The work rule at issue here in no way restricts, or even addresses, employee Section 7 rights exercised in the workplace.

Finally, the ALJ failed to consider the legitimate interests of the employer. The policy covers the protection of the employer's intellectual property asset – a legitimate business interest in itself. The appropriation and use of company intellectual property imposes incalculable risk, liability and possible damage to the employer. Unidentified persons, under the company logo/insignia, may make statements that alienate one or more segments of the public. Even mildly offensive or hurtful statements can affect the company's reputation, public relations, customer relations, and sales. At the water cooler, the audience is limited and the author is identified and obviously not thought to be speaking on behalf of the company. Online this is often not the case. Furthermore, in order to ensure that intellectual property rights remain protected, they must be restricted to ensure they are not deleted.

Once again, the ALJ goes too far. The policy is appropriately tailored to protect the Respondent's legitimate business interests and cannot reasonably be read to restrict the exercise of Section 7 rights.

C. **The Portion Of The Policy Restricting Discussion Of "Confidential And Proprietary Information" Is Not Unlawful.**

The Respondent's Online Communication policies state:

> Confidential and proprietary information should not be discussed in any public forum unless it has been publicly reported by the Company. Confidential and proprietary information includes but is not limited to: financial results, new store designs, current or future merchandising initiatives, and planned technology uses or applications. Do not comment on rumors, speculation or personnel matters. (February 2011 policy)

> Confidential and proprietary information should not be discussed in any public forum unless it has been publicly reported by the Company. Confidential and proprietary information includes but is not limited to: financial results, new store designs, current or future merchandising initiatives, and planned technology uses or applications. Do not comment on rumors or speculation related to the Company's business plans. (June 2011 Policy)

The ALJ held that the February 2011 policy was unlawful on its face because it prohibits comments relating to "personnel matters." However, as discussed in detail below, the February 2011 policy was rescinded and replaced by the June 2011 policy. Therefore, claims relating to the February 2011 policy are time-barred.

The ALJ also held that the June 2011 policy was unlawful. He held that "rumors or speculation related to the Company's business plans" can reasonably be read to cover protected activity, such as discussions of "closures, layoffs, or transfers of work." That is not a reasonable reading of the rule as written.

The rule is not a blanket prohibition on discussion or comments related to "business plans." Rather, it prohibits such comments from being made online as part of a "public forum." This policy does not restrict employees from engaging in conversation with one another – online or in person – regarding any topic. Instead, it restricts the general publication of comments on "rumors or speculation related to . . . business plans." And even then, the restriction only applies when the information has not been publically reported by the company.

It is theoretically possible to read "business plans" to include such topics as transfers or promotions. But such an interpretation ignores the context of the paragraph as a whole. The far more reasonable interpretation is that "business plans" relate to the confidential and proprietary information referenced in the prior sentence – "financial results, new store designs, current or future merchandising initiatives, and planned technology uses or applications." In other words, things that are routinely recognized as worthy of protection by law.

In OM 12-59, the Board approved a policy that required employees to "maintain the confidentiality of the Employer's trade secrets and private and confidential information." The Board explained that employees have no protected right to disclose trade secrets. (OM 12-59, p. 20, citing *Walmart*, Case 11-CA-067171). Another factor the Board valued in finding the policy lawful is that it provides sufficient examples of prohibited disclosures (i.e., information regarding the development of systems, processes, products, know-how, technology, internal reports, procedures or other internal business-related communications) so that employees would understand that it does not reach protected communications about working conditions. (*Id*.)

The Approved Policy specifically found lawful language that requires employees to:

- Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trades secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.

- Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.

Kroger's policy likewise prohibits disclosure of "confidential and proprietary information" that has not been publically disclosed and provides examples of what that might be. Specifically, the June 2011 policy prohibits comments ***on topics identified in the policy itself*** and is therefore

indistinguishable from the Approved Policy. In that context, the policy cannot reasonably be construed to cover Section 7 activity. See *In Re Tradesmen Int'l*, 338 NLRB at 460-62.

The ALJ held that *Hyundai American Shipping Agency, Inc.*, 357 NLRB No. 80 (2011), did not apply here. In *Hyundai*, the Board reversed the ALJ and held that rules prohibiting "harmful gossip" and "exhibiting a negative attitude . . . toward your work assignment" lawful. (357 NLRB No. 80, slip op. at 2). The ALJ attempted to distinguish *Hyundai* by arguing that Kroger's policy is different because employees have a statutorily protected right to engage in false statements. That is a misreading of the rule and a misapplication of *Hyundai*.

Employees have no protected right to make statements related to non-public, confidential information. In fact, Kroger has a legal obligation under SEC rules to ensure non-public information is disclosed only when and how appropriate. If a rule prohibiting "gossip" generally is lawful, the much narrower rule here must also be, unless the ALJ is starting with the assumption of unlawfulness – which is an assumption he must not make.

Respondent's policy appropriately restricts the dissemination of information employees have no right to disclose, and comports with policies previously approved by the Board. The portion of the ALJ's decision finding the rules regarding intellectual property should be rejected.

D. The Portion Of The Policy Prohibiting "Inappropriate" Behavior Is Not Unlawfully Overbroad.

The Respondent's Online Communication policies state:

> The Company's other policies and rules of conduct (including, but not limited to, its policy on business ethics, its intellectual property policy and its anti-discrimination and anti-harassment policies) apply to all publications of any kind that relate in any way to the Company or to your work with the Company. When online, do not engage in behavior that would be inappropriate at work and that will reflect a negative or inaccurate depiction of our Company. (February 2011 Policy)
> When online, do not engage in behavior that would be inappropriate at work—including, but not limited to, disparagement of the Company's (or competitors')

> products, services, executive leadership, employees, strategy and business prospects. (June 2011 Policy)

The ALJ held that the above language prohibiting employees from engaging in "inappropriate" behavior was unlawfully overbroad.

The policies stress the connection between behavior which occurs at work and that which occurs online. In other words, employees cannot simply take inappropriate behavior online and think it will not have the same consequences as it would if engaged in off-line. This is particularly true, again, when the complete policy is read in context. The ALJ focused on the portion of the policy stating, "When online . . ." but completely ignores the previous sentence, which makes clear that the policy is covering actions covered by "other policies and rules of conduct."

With respect to the February 2011 policy, again Respondent notes that the policy was rescinded and the Charge is therefore untimely. [15]

In *General Motors, LLC & Michael Anthony Henson*, 07-CA-53570, 2012 WL 1951391 (NLRB Div. of Judges, May 30, 2012), the ALJ found lawful General Motors' policy, which, like the policy here, connects behavior that occurs at work and that which occurs online. The General Motors policy contained language which provided, in relevant part: "offensive, demeaning, abusive or inappropriate remarks are as out-of-place online as they are offline."

[15] However, even assuming the Charge was timely, the policy is not unlawful. The ALJ found that the rule prohibits any online discussion that would "reflect a negative or inaccurate depiction" of Respondent. Again, the ALJ took one phrase out of context. The full sentence reads: "Do not engage in behavior that would be inappropriate at work and that will reflect a negative or inaccurate depiction." Thus, prohibited communication must meet both prongs of the test – it must be inappropriate and reflect negatively on the Company. Many conversations that might be inappropriate at work may have nothing to do with the Company. Such comments would not violate this policy. Conversely, many "negative" comments about the Company would be appropriate at work, and therefore also not prohibited by the policy. The ALJ's selective reading of the rule, and disregard of the conjunction, goes too far.

There can be no doubt that behavior that is not protected in the workplace is also not protected when it occurs outside the workplace. As such, because the Kroger policy does no more than level the playing field between inappropriate behavior that takes place at its stores and that which takes place outside of its stores, it would not reasonably be construed to cover protected Section 7 activity.

The Approved Policy in OM 12-59 included an even more expansive prohibition:

> Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.

Memorandum OM-12-59, p. 22. Thus, the Board Approved Policy prohibits conduct which could have an adverse effect on fellow associates, customers, and the like. The Kroger Policy contains no such expansive prohibition.

The Approved Policy goes on to provide:

> Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of [Employer]. Also, keep in mind that you are more likely to resolve work related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably ***could be viewed*** as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

(*Id*., at pp. 22-23) (emphasis added). This language prohibits any statement that "could be viewed" (even if not actually intended) as "malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying." In contrast, Kroger's policy refers only to conduct that *actually is inappropriate*.

Finally, Kroger's 2011 policy clarifies and restricts its scope with the example of "disparagement" and, in so doing, could not reasonably be construed to cover Section 7 activity. For example, in *Claremont Resort and Spa*, 344 NLRB 832 (2005), the Board found that a rule

> prohibiting negative conversations about managers had a potential chilling effect on Section 7 activities because the rule was amongst a list of policies regarding working conditions and there was no further clarification or examples to provide context.

(*Id.* at 836). Conversely, in *Tradesman International*, 338 NLRB 460, 462 (2002), the Board did not find a chilling effect where rules prohibiting slanderous statements or statements detrimental to the company were included on a list of prohibited conduct that included harassment and sabotage because in light of the context (i.e., list of egregious behavior), employees could not reasonably believe that the rule applied to Section 7 activity. The Board also did not find a chilling effect where rules prohibited disloyal, disruptive, competitive, or damaging conduct because the rules addressed legitimate business concerns, and gave examples of the type of conduct proscribed. (*Id.* at 461-462).

The June 2011 policy is even more narrowly tailored. It deletes the reference to "negative or inaccurate depiction" and instead specifically references disparagement. Again, the policy is specifically tied to behavior that would be inappropriate at work; Section 7 activity is, of course, protected at work and therefore is not "inappropriate."

A reasonable reading of the Respondent's policies with respect to "inappropriate" behavior would not lead to the conclusion that the policies restrict Section 7 activity.

E. Portions Of The Complaint Related To The February 2011 Policy Are Barred By The Statute Of Limitations.

Even assuming Kroger's February 2011 policy was unlawful, the Charge underlying the Complaint is untimely because the policy was rescinded and replaced more than six months before the filing of the Charge. The General Counsel bears the burden of proving that Kroger

maintained an unlawful policy during the applicable limitations period. 29 U.S.C. § 160(c) (violations of the Act can be adjudicated only "upon the preponderance of the testimony" taken by the NLRB); 29 C.F.R. § 101.10(b). See also Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556 ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); *NLRB v. Fluor Daniel, Inc*., 161 F.3d 953, 965 (6th Cir. 1998). The ALJ ultimately held that the February 2011 Policy remained in effect even after it was rescinded and replaced, despite the fact that "Kroger followed its regular procedures for promulgating the updated policy." (ALJ, p. 5).

Kroger has established a comprehensive procedure for disseminating and notifying its employees of policy changes. All changes are disseminated to management via email with instruction that the revised policy must be posted on each store's Communication Board and by the store's time clocks. (Tr., 45-46). These locations are used because they are areas that all employees seek out *on a daily basis* to view work schedules and information regarding store happenings and events. (*Id*., p. 50). The ALJ agreed it is a "designated and prominent place." (ALJ, p. 5).

All policy changes are also posted on Kroger's intranet, to which all employees have access. (*Id*., pp. 47, 50). In fact, Kroger actually provides computer access in the store for all employees so that they are able to view the intranet regularly: "One in the break room, three in the computer room, one at the service counter." (*Id*., p. 55). As with the bulletins boards, there is information on Kroger's intranet that employees regularly seek out and, therefore, they are exposed to notices of policy changes. (*Id.*, pp. 55-56).

Notice posting, and electronic posting, is, of course, a long respected form of employee communication. The Board itself – and the ALJ in this case – regularly orders employers to

"post . . . copies of the attached notice . . . . In addition the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means." (ALJ, p. 24). This, of course, is exactly how Kroger communicated the change in the February 2011 policy to employees – through distribution on the Company's intranet site, and through physical posting at the work sites. Thus, the ALJ evidently believes that notice posting is good enough to ensure that his order will reach employees, but not good enough to inform employees about changes to the employer's policies.

The ALJ cites to the Company's "continued distribution" of the policy. (*Id.*) The ALJ relies heavily on *Winkle Bus Co.*, 347 NLRB 1203 (2006). The ALJ ignores several distinctions between *Winkle* and the present case. First, in *Winkle*, the employer continued to "include the unlawful policy" in a new version of its employee handbook. (*Id.*, at 1216). Here, the testimony was clear that a new handbook was not published; rather, Kroger maintained changes to many policies online and through postings. Furthermore, in *Winkle*, the employer never issued a new policy – it revoked the policy, but continued to distribute it, even in newly-published handbooks, and did not issue a replacement policy. *Winkle* "conceded at trial that the Respondent did nothing to inform employees that the [policy] had been narrowed." That is not the case here. Unlike in *Winkle*, a new policy was created and posted. The new policy was dated, so there was no question of which policy controlled. (Ex. R-3). Thus, the alleged "confusion" that employees may have regarding which policy controlled assumes that employees do not understand dates.

The uncontroverted evidence in this matter proves that the February 2011 Policy was rescinded when the revised June 2011 Policy was promulgated and disseminated. Once rescinded and replaced, the February 2011 Policy was no longer maintained by Kroger. Accordingly, the statute of limitations had run and the claims are time-barred.

F. The ALJ Should Have Considered Evidence Of The Regional Director For Region 19's Approval Of A Substantially Identical Policy In Determining The Lawfulness Of The Policies At Issue Here.

At the hearing, Respondent proffered documents (Ex. R-1 and R-2) which reflect that the Region 19 Director approved a Smith's policy that is virtually identical to the Kroger Policy at issue in this case. There has been no substantive change in the law since that time. The ALJ excluded these documents. Counsel for the General Counsel argued against the admission of Exhibits R-1 and R-2 claiming that they were inadmissible under Federal Rule of Evidence 408. The Administrative Law Judge found that the exhibits were not governed by Rule 408, but were nonetheless irrelevant. In his Decision, he renewed that ruling stating that "in resolving the instant case, it simply does not matter what position a Regional Director took in a different case three years ago to settle that case."

The exhibits reflect compliance procedures that governed implementation of a settlement between Region 19, Smith's and the United Food and Commercial Workers Local #4. They demonstrate that the very policy language at issue here was endorsed by the Region 19 Director. It is absolutely incredible to suggest that a finding of lawfulness on an issue in Region 19 has no bearing on a claim of unlawfulness in Region 7 *on the exact same issue*. This type of conflict is precisely what the General Counsel has unambiguously asserted that the Board has sought to avoid:

> [The NLRB General Counsel's] statement says that the Advice Branch establishes 'uniform policies' in those legal areas with respect to which Regional Directors are 'required' to seek advice until a 'definitive' policy is arrived at. This is so because ***if Regional Directors were 'free' to interpret legal issues 'the law could, as a practical matter and before Board decision of the issue, be one thing in one Region and conflicting in others***.'

NLRB v. Sears, Roebuck & Co., 95 S. Ct. 1504, 1520 (1975) (citing NLRB General Counsel Statement Submitted to House Labor Subcommittee on June 29, 1961), 1 CCH Lab.L.Rep. 1150,

pp. 3075 (1968)). The General Counsel affirmatively stated that it was the Board's goal to have a mechanism ***to prevent the very conflict created by this decision***: Regional Directors freely interpreting legal issues (here, whether policy relating to social media conduct by employees unlawfully restricted Section 7 rights) results in a policy "being one thing" (that is, lawful in Region 19) and "conflicting in others" (that is, unlawful in Region 7). Region 19 either approved a settlement it believed to be lawful or it settled the case without considering the legality of the terms of the settlement. The latter is bureaucratic double-speak that would make Orwell proud.

An agency must "display awareness that it is changing position" and "may not . . . depart from a prior policy *sub silentio*." *Fox*, 129 S.Ct. at 1811. An agency's decision to change its mind is arbitrary and capricious if the agency ignores or countermands its earlier findings without reasoned explanation for doing so. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 103 S. Ct. 2856, 2869 (1983). An agency that changes course must "display awareness that it is changing position" and "must show that there are good reasons for the new policy." *Fox*, 129 S.Ct. at 1811. By claiming the exhibits are irrelevant, counsel for the General Counsel and the ALJ are flat out ignoring prior policy and arbitrarily changing the Agency's position. In the absence of the General Counsel articulating a reasoned explanation for why the language approved by Region 19 is no longer acceptable, its action asserting a violation by Kroger in this case is arbitrary and in contravention of the doctrine articulated in *Fox*. To hold otherwise would create legal chaos, leaving employers no sense of the law and no meaningful way to comply with it.

The ALJ argues that the General Counsel's authority with respect to exercise of prosecutorial discretion is not subject to review. As such, he held that the decisions to "settle

short of hearing carry no precedential weight" and "are not binding on the General Counsel in future cases." (ALJ Decision, p. 21). Translation: legally binding settlements should be given no legal effect. This is pure legal fantasy. A settlement is intended to bring clarity to all parties and cannot wantonly be discarded as "irrelevant" when it involves approval of identical language with no intervening change in the law. Here, however, Respondent is not arguing that the fact that the General Counsel agreed to settle the Smith's case is evidence that it should settle, or not bring, the instant case. Rather, the point is that the Region 19 Director, through the settlement, expressly condoned the language of the Smith's policy. That language is substantially similar to the language in this case. Smith's and Kroger are affiliated companies. It is, then, perfectly reasonable to expect that the two might have similar policies. Employers should be able to rely on the Board's blessing of particular language, absent some differentiating circumstances.

In addition, evidence relating to Region 19's approval of Smith's policy is admissible for quasi-estoppel purposes. "'Quasi-estoppel' describes a situation in which [one] is not permitted to 'blow both hot and cold,' taking a position inconsistent with prior conduct, if this would injure another, regardless of whether that person actually relied thereon." *PACE Indus. Union–Mgmt. Pension Fund v. Dannex Mfg. Co., Inc*., 394 F. App'x 188, 199 (6th Cir.2010) (citations omitted). See also *Painters District Council No. 38 v. Edgewood Contracting Co*., 416 F.2d 1081, 1083–84 (5th Cir.1969) (NLRB finding that union had engaged in an unfair labor practice had preclusive effect in subsequent litigation). Where one Region not only approved a policy, but actually negotiated the language, another Region should be estopped from now taking the position that the same language unlawfully restricts Section 7 activities. See, e.g., *Starter Corp. v. Converse, Inc*., 170 F.3d 286 (2d Cir.1999) (holding settlement agreement and negotiations admissible to prove estoppel claims); *Bankcard America, Inc. v. Universal Bancard Systems, Inc*., 203 F.3d 477, 484 (7th Cir.2000) (holding settlement agreement and negotiations

admissible to prove estoppel and state-of-mind); *Carolina Indus. Products, Inc. v. Learjet, Inc*., 168 F.Supp.2d 1225 (D.Kan.2001) (holding settlement agreement and negotiations admissible to prove equitable estoppel); *Savoy IBP 8, Ltd. v. Nucentrix Broadband Networks, Inc*., 333 B.R. 114, 122 (N.D. Tex. 2005) (same); *PRL USA Holdings, Inc. v. United States Polo Assoc., Inc*., 520 F.3d 109, 113 (2d Cir.2008) (affirming admissibility of parties' earlier settlement discussions for "another purpose" of establishing estoppel in subsequent suit).

Accordingly, Exhibits R-1 and R-2 were relevant and admissible and, for the reasons set forth above, should not have been excluded.

V. CONCLUSION

The Policy provisions that the ALJ found unlawful cannot reasonably be construed to chill Section 7 activity. A reasonable reading, within the overall context of the Policy and the Respondent's actions, leads to the conclusion that the policy appropriately protects the Respondent's legitimate business interests.

Furthermore, the portion of the charge relating to the February 2011 policy is barred by the applicable statute of limitations.

Accordingly, the Respondent's exceptions should be granted, and the ALJ's Decision reversed.

Respectfully submitted,

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Dated: June 17, 2014

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2014, I electronically filed the foregoing paper with the National Labor Relations Board and I electronically served a copy of same on the following:

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